In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 171

HENRY C. HILL, WARDEN, UNITED STATES NORTHEASTERN PENITENTIARY, PETITIONER

v.

UNITED STATES EX REL. JOSEPH WEINER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

I.

SECTION 24 OF THE CLAYTON ACT, PROPERLY AND EFFECTIVELY CONSTRUED, DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION.

Respondent contends that if Section 24 of the Clayton Act is given the effective construction which the government has placed upon it, there would be an arbitrary discrimination in favor of the government in violation of the due process clause of the Fifth Amendment (respondent's brief, p. 7).

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The government submits that respondent's argument is wholly without merit and that the separate classification given by Section 24 to contempts of decrees obtained by the government and those obtained in private suits is neither arbitrary nor unreasonable. Congress may classify persons and objects for the purpose of legislation, and due process requires only that the classification be reasonable and that it bear some relation to the object sought to be attained by the legislation. *United States* v. *Delaware & Hudson Railway Co.*, 213 U. S. 366; *Nebbia* v. *New York*, 291 U. S. 502; *Second Employers' Liability Act Cases*, 223 U. S. 1. The legislative history of Section 24 discloses that Congress had a reasonable basis for treating contempts of decrees obtained in suits by the government differently from contempts involving decrees obtained in private suits. The purpose of the different treatment, as is manifest from statements by sponsors of the bill quoted on pages 15–19 of our original brief, was to curb the abuses by private corporations of the injunctive process without detracting from the government's power to enforce its injunctions, particularly those obtained by the government against combinations in restraint of trade. Representative Clayton, sponsor of the bill, stated that the purpose was to prevent private corporations from abusing the process of contempt by obtaining "blanket midnight injunctions" against laboring people and "framing up criminal cases for the purpose of

depriving men of the right of trial by jury" (48 Cong. Rec. Pt. 9, p. 8779, 62nd Cong., 2nd Sess.). Other members of the House and Senate Judiciary Committees made similar statements as to the purpose of the new remedy, and no member of Congress appears to have expressed a contrary purpose.

Thus it appears that Congress adopted the reasonable theory that there would be less likelihood of abusing the injunctive process if restrictions were imposed upon the enforcement of decrees obtained in private suits.

It should be noted that Sections 21–25 of the Clayton Act deal entirely with *procedural* rather than substantive rights. That the government may be granted remedies not made available to individuals generally is demonstrated by *United States* v. *Union Pacific Ry. Co.*, 98 U. S. 569, where the Court sustained a statute which authorized the government to institute special proceedings in connection with frauds committed in building the Union Pacific Railway, rejecting the contention that the statute was unconstitutional because it discriminated in favor of the government.

Respondent's brief (p. 9) suggests that the only purpose of punishment for criminal contempt is to vindicate the dignity and authority of the court and that the dignity of the court is in no greater need of vindication in the case of a contempt of a government decree than in the case of a contempt of a private decree. This Court has recognized, in

Michaelson v. *United States,* 266 U. S. 42, 65, that the "dominating purpose" of a criminal contempt proceeding "is punitive to vindicate the authority of the court *and to punish the act of disobedience as a public wrong*" (Italics supplied). The proceeding is one "between the public and the defendant," not between the court and the defendant. *Michaelson* v. *United States,* 266 U. S. 42, 67.

Section 24 does not impose a higher punishment upon one than is "prescribed to all for like offenses," as suggested in respondent's brief (p. 7), because the offense committed by violating a public decree obtained by the government is not identical with the offense committed by violating a private decree. The "public wrong" is normally more serious where the contempt is in violation of a decree obtained by the government, and Congress may therefore classify the latter contempts separately and provide more favorable procedure for defendants violating decrees obtained in private suits. Such classification is reasonably related to the object sought to be attained, namely, curbing abuses of the injunctive process by private corporations and maintaining the government's power to punish effectively public wrongdoers who violate decrees obtained by the government.

In *Michaelson* v. *United States,* 266 U. S. 42, this Court overruled a contention that Sections 21–25 interfered with the inherent power of a court to punish for contempt and held that these sections were constitutional. After emphasizing the nar-

row scope of Section 22 and the limitations placed upon it by Section 24, the Court said (p. 66): "If the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise." In *United States* v. *Goldman*, 277 U. S. 229, respondent urged that it would be unreasonable to restrict Section 25 of the Clayton Act to contempts of private decrees,[1] but this Court expressly said that under Section 24 the provisions of Sections 21, 22, 23, and 25 do not apply to criminal contempts for disobedience of decrees obtained by the United States. It assumed that these provisions of the Clayton Act were constitutional.

II

THE SIX MONTHS' LIMITATION ON CONTEMPT SENTENCES IN SECTION 22 OF THE CLAYTON ACT IS INSEPARABLE FROM THE PROVISION OF SECTION 24 TO THE EFFECT THAT SECTION 22 SHALL NOT APPLY TO CONTEMPTS OF DECREES OBTAINED BY THE GOVERNMENT. RESPONDENT CANNOT ATTACK THE VALIDITY OF SECTION 24 BECAUSE HE IS NOT INJURED BY THE CLASSIFICATION THEREIN.

In enacting Sections 21–25 of the Clayton Act, Congress created a new remedy for the protection of defendants in certain classes of contempts of decrees obtained in private suits. Senator Borah's amendment to strike out Section 24 and thereby extend the limitations of Section 22 to contempts

[1] See respondent's brief in *Goldman* case, p. 39 (Records and Briefs, October Term, 1927, No. 723).

of decrees obtained in suits by the government was rejected (51 Cong. Rec., Pt. 14, pp. 14377, 14417, 63d Cong., 2d Sess.). This is a clear indication that Congress did not intend to extend the procedure of Section 22 to contempts of decrees obtained in suits by the government.

If Section 24 were invalid, then Section 22 likewise would fall because Congress clearly intended that the six months' limitation on contempt sentences should not apply to contempts of decrees obtained by the government. Therefore, if the classification which Congress clearly intended to make should be held to be invalid, it would carry with it the six months' limitation imposed by Section 22. The legislative history leaves no doubt but that the six months' limitation on contempt sentences in Section 22 and the exemption in Section 24 from such limitation for contempts of decrees obtained by the government are inseparable.

It follows therefore that if Section 24, to the extent that it exempts contempts of decrees obtained by the government from the six months' limitation imposed by Section 22, is unconstitutional, the six months' limitation of Section 22 also is unenforceable and the remedies for contempt existing prior to the Clayton Act are applicable. Thus, even if there were an invalid classification in Section 24, respondent would not be injured by it and could not attack it. *Frothingham* v. *Mellon,* 262 U. S. 447, 488. Respondent is in no position to complain that the new procedure prescribed by the Clayton Act is unconstitutional merely because it does not

go further and extend to him the same advantages which it extends to defendants violating private injunctions.

Respondent relies upon the separability clause of the Clayton Act (U. S. C., Title 15, Sec. 27). The construction contended for by respondent requires more than the mere presumption of separability. It requires that the Court reframe the legislation in a manner explicitly and vigorously opposed by sponsors of the bill and members of the committees which reported it.

The presumption of separability is rebutted, not only by the express language of the Act but also by the legislative history which establishes "the clear probability that the legislature would not have been satisfied with the statute unless it had included" the part alleged to be invalid. *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165, 184.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, the Court applied the following test of separability (at p. 313):

> Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statute should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code.

Rejection of the Borah amendment demonstrates unequivocally the intention of Congress not to en-

act Section 22 of the Clayton Act without the qualifying limitations contained in Section 24.

In *United States* v. *Goldman*, 277 U. S. 229, 238, this Court treated Sections 21–25 as a unit:

> Although Sec. 25 is broad enough, upon its face, to provide a period of limitation of one year in all criminal contempts, we think that when construed in the light of the context *and read in connection with the preceding sections*, it does not relate to the prosecution for criminal contempts of the character here involved. [Italics supplied.]

A statute which "expressly and clearly changes the common law only in certain distinctly specified cases cannot properly be construed as applying to other cases." *United States* v. *Taliaferro*, 290 Fed. 214, 222. As this Court said in *Ross* v. *Jones*, 22 Wall. 576, 591–592:

> Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied.

III

THE COURT BELOW ERRONEOUSLY ASSUMED THAT THE TRIAL COURT HAD FOLLOWED THE PROCEDURE OF THE CLAYTON ACT, AND CONCLUDED THAT THE SENTENCE MUST THEREFORE BE LIMITED BY SECTION 22 OF THE CLAYTON ACT.

In our original brief (pp. 20–23) we pointed out that because of respondent's waiver of jury trial,

the court below erroneously concluded that the trial court in New York had proceeded under the Clayton Act rather than under Section 268 of the Judicial Code. Respondent now replies that the procedure followed by the trial court is of no materiality. We agree that it is not material. However, both courts below (R. 149, 167) advanced the supposed fact that the trial court had followed the procedure of the Clayton Act as one of their reasons for applying the six months' sentence provided by Section 22 of the Clayton Act. It therefore became necessary to note, as we did in our main brief, that the trial court had not followed the procedure of the Clayton Act.

CONCLUSION

In conclusion, it should be observed that respondent has suggested (p. 12) that the trial court in imposing a two-year sentence failed to give weight to the fact that respondent had been sentenced for certain related offenses by a New York State court. As we have pointed out in our original brief (footnote p. 6), respondent obtained a substantial reduction of a three-year indeterminate sentence which had been imposed by the state court in consideration for having withdrawn his appeal from the two-year sentence imposed by the United States District Court for Southern New York. Furthermore, it is well settled that a defendant whose single act violates a decree of a court as

well as a criminal statute may be tried and punished for both. *In Re Debs,* 158 U. S. 564, 594.

It is respectfully submitted that the judgment below should be reversed.

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JANUARY 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937